STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Clarendon County

Honorable Brooks P. Goldsmith, Circuit Court Judge

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AUG 23 2017

S.C. SUPREME COURT

ANDREW L. BLACKMON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-002514

JOHNSON PETITION FOR WRIT OF CERTIORARI

Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR PETITIONER

INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT OF THE CASE 2

ARGUMENT

Plea counsel's failure to investigate, pursue, and prepare an insanity defense and timely notify the prosecution of Petitioner's intention to rely upon the defense of insanity violated Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution in light of the abundant evidence of Petitioner's significant history of mental illness 6

CONCLUSION 10

PETITION TO BE RELIEVED AS COUNSEL 11

ISSUE PRESENTED

Did plea counsel's failure to investigate, pursue, and prepare an insanity defense and timely notify the prosecution of Petitioner's intention to rely upon the defense of insanity violate Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution in light of the abundant evidence of Petitioner's significant history of mental illness?

STATEMENT OF THE CASE

Petitioner has a significant history of mental illness dating back to at least 2008. He has been diagnosed with bipolar disorder and post-traumatic stress disorder (PTSD). App. 146, ll. 6-19. In 2009, he was rendered unable to work in any form of employment due to "his symptoms of irritability, explosive tendencies, and inconsistent mood." App. 62; App. 224. Consequently, Petitioner received disability benefits from the state of Massachusetts. App. 64. In order to manage his illness, Petitioner takes a regimen of psychotropic medications. For example, in 2009, he was prescribed Prozac to treat depression and anxiety, Lamictal, a mood stabilizer, and Trazodone as a sleeping aid. App. 62.

On January 25, 2013, Petitioner was arrested in Clarendon County after he allegedly entered a bank, passed a note to the teller, demanded money, and fled with cash. However, at the time of the offense, Petitioner had been off his medication for at least a couple of years. App. 146, ll. 16-20. He had moved to South Carolina from Boston and was unable to find a psychiatrist in the small town of Alcolu where he lived with his wife. App. 146, ll. 21-25; App. 219.

Shortly after his arrest, Petitioner was appointed an attorney with the Third Circuit Public Defender Office, Lewis King Cutter. App. 177, ll. 8-15. Petitioner told Cutter that he suffers from mental illness and did not rob the bank "with a sound mind." App. 145, l. 22 – 146, l. 13. He asserted that he had no reason to steal from the bank "[s]o something must've gone . . .wrong that day." App. 178, ll. 15-22. Based on this information, Cutter sought to have Petitioner evaluated by the Department of Mental Health to determine whether he was criminally responsible pursuant to S.C. Code Ann. § 17-24-10(A) and had the capacity to conform his conduct to the requirements of the law pursuant to S.C. Code Ann. § 17-24-20(A), also known as

a "M'Naghten evaluation." App. 178, l. 23 – 179, l. 1; App. 212. The state consented to the evaluation and the court ordered the evaluation accordingly. App. 179, ll. 1-2.

Petitioner was evaluated on May 7, 2013 at the Department of Mental Health by a licensed clinical psychologist and a licensed independent social worker. App. 212. The evaluators failed to diagnose Petitioner with bipolar disorder or PTSD, despite his previous diagnoses. App. 212-223. They concluded he "did not lack the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong, as the result of a mental disease or defect, at the time of the alleged offense." App. 222.

Petitioner disagreed with these findings and continually maintained that he suffered from severe mental illness. App. 180, ll. 4-24. At some point, Counsel Cutter obtained Petitioner's medical records from the local detention center, the Department of Mental Health in Clarendon County, and a local hospital. He was also able to get a one page letter from a Dr. Cynthia Carter at the Rox Comp Behavioral Health in Roxbury, Massachusetts that was dated December 29, 2009. App. 181, l. 2 – 182, l. 18. In this letter, Dr. Carter stated that Petitioner was under her care for bipolar disorder and, in her opinion, "his symptoms of irritability, explosive tendencies, and inconsistent mood render him unable to work in any form of employment." App. 224. Cutter explained that this was the only document he could obtain from Dr. Carter because her practice had closed and all her records had been boxed up. App. 182, ll. 15-18.

Despite the evidence from Petitioner's medical records that he had previously been diagnosed with bipolar disorder and PTSD, Cutter failed to request a second evaluation by an independent psychiatrist or investigate and pursue an insanity defense. App. 184, l. 15 – 185, l. 10.

Petitioner's case was ultimately called to trial on November 4, 2013. On that date, counsel for the first time requested funds for an independent evaluation and submitted notice of intent to rely on an insanity defense. App. 19. After taking the matter under advisement, the trial judge refused to allow Petitioner to obtain an independent evaluation or to present an insanity defense by use of lay witnesses due to counsel's failure to comply with Rule 5(f), SCRCrimP. App. 20.

A Clarendon County Grand Jury indicted Appellant on February 28, 2013 for entering a bank with intent to steal. App. 248-249. On November 5, 2013, Petitioner pled guilty as indicted before the Honorable William Jeffrey Young. App. 1. Assistant Solicitor Christopher Durant represented the state and, as stated, Lewis King Cutter represented Petitioner. App. 1. Judge Young sentenced Petitioner to fifteen years' imprisonment. App. 13, ll. 7-10.

At the beginning of his guilty plea, Petitioner told Judge Young that he suffers from mental illness, but that he had not been properly diagnosed in South Carolina. App. 4, ll. 8-14. The judge then read Petitioner the allegations contained in the indictment and asked whether those allegations were the truth. Petitioner responded, "Under mental illness." App. 4, l. 19 – 5, l. 6. After Judge Young told Petitioner "we're not going into that," he again asked whether the allegations in the indictment were true. Petitioner said, "No, sir." App. 5, ll. 7-19. A break in the proceedings then occurred.

Only after Petitioner was informed that the trial judge would not permit him to present an insanity defense did the proceeding continue. Petitioner then stated that the allegations in the indictment were true and agreed with the facts as cited by the assistant solicitor. App. 6, l. 3 – 8, l. 12. The judge ultimately accepted Petitioner's plea and sentenced him to fifteen years' imprisonment. App. 12, l. 9 – 13, l. 10.

Petitioner's direct appeal was dismissed by the Court of Appeals pursuant to Anders v. California, 386 U.S. 738 (1967). App. 114-115. On August 21, 2015, Petitioner filed an application for post-conviction relief. App. 116-121. The state filed a return to the application dated October 28, 2015. App. 122-127. An evidentiary hearing was convened on March 14, 2016 before the Honorable Brooks P. Goldsmith. App. 128. Assistant Attorney General Daniel Gourley represented the state, and Lance Boozer represented Petitioner. App. 128.

The PCR court ultimately ruled Petitioner's guilty plea was freely, voluntarily, and intelligently entered and that counsel was not ineffective. App. 231-233. The court found "the record reflected [Petitioner] was fully advised that he was pleading guilty and waived all challenges to the evidence against him." App. 233. The court also noted that the "plea court's very thorough colloquy with [Petitioner] demonstrates that he understood the consequences of pleading guilty." App. 233. Therefore, the court denied Petitioner relief.

Because Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made due to counsel's ineffective assistance for failing to investigate, pursue, and prepare an insanity defense and timely notify the prosecution of Petitioner's intention to rely upon the defense of insanity, this petition for writ of certiorari follows.

ARGUMENT

Plea counsel's failure to investigate, pursue, and prepare an insanity defense and timely notify the prosecution of Petitioner's intention to rely upon the defense of insanity violated Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution in light of the abundant evidence of Petitioner's significant history of mental illness.

Counsel's failure to investigate, pursue, and prepare an insanity defense and timely notify the prosecution of Petitioner's intention to rely upon the defense of insanity violated Petitioner's right to the effective assistance of counsel in light of the abundant evidence of Petitioner's significant history of mental illness. Counsel's ineffectiveness rendered Petitioner's guilty plea involuntary.

"An accused who lacks the capacity to distinguish moral or legal right from moral or legal wrong at the time of the crime is relieved of responsibility for his acts." Davenport v. State, 301 S.C. 39, 40, 389 S.E.2d 649, 649 (1990) (citing State v. Law, 270 S.C. 664, 244 S.E.2d 302 (1978) and State v. Cannon, 260 S.C. 537, 197 S.E.2d 678 (1973)); See S.C. Code Ann. § 17-24-10(A) ("It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong."). "The defendant has the burden of proving the defense of insanity by a preponderance of the evidence." S.C. Code Ann. § 17-24-10(B).

Upon written request of the prosecution, if a defendant intends to rely upon the defense of insanity at the time of the crime, he must notify the prosecution in writing within ten days or at

such time as the court may direct. Rule 5(f), SCRCrimP. If the defendant fails to timely notify the prosecution, the court may exclude the testimony of any expert witness offered by the defendant on the issue of his mental state. Id. However, the court may, for good cause shown, allow the late filing of the notice or grant additional time to the parties to prepare for trial. Id.

"The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel." Bailey v. State, 392 S.C. 422, 432, 709 S.E.2d 671, 676 (2011) (citing U.S. Const. amend. VI and Strickland v. Washington, 466 U.S. 668 (1984)). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686; see Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used to evaluate allegations of ineffective assistance of counsel. In light of the fact that Petitioner pled guilty to the charged offense, Petitioner must show that counsel's performance was deficient and that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). "To show prejudice for failing to pursue [an insanity] defense, the petitioner must produce some evidence of insanity or a showing that with the exercise of due diligence, an insanity defense could have been developed." Jeter v. State, 308 S.C. 230, 233–34, 417 S.E.2d 594, 596 (1992) (citing State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982)); See Daniel v. State, 282 S.C. 155, 317 S.E.2d 746 (1984).

Here, counsel was ineffective for failing to investigate and pursue an insanity defense in light of the abundant evidence of Petitioner's significant history of mental illness. Petitioner repeatedly told counsel that he suffered from mental illness, including bipolar disorder and PTSD, and that he did not commit the offense with a sound mind. Counsel also had a portion of Petitioner's medical records, which included evidence that Petitioner had in fact been diagnosed with bipolar disorder and PTSD in the past, and was rendered unable to work in any form of employment due to "his symptoms of irritability, explosive tendencies, and inconsistent mood." App. 224. Counsel was also aware that Petitioner received disability benefits from the state of Massachusetts. Any competent criminal defense attorney armed with this information would have pursued and prepared an insanity defense. Plea counsel was ineffective for failing to do so.

It was not until the eve of trial, and only as a last minute consideration, that counsel submitted notice of Petitioner's intent to rely on the defense of insanity. Counsel submitted the notice without doing any investigation or preparation. The trial judge refused to permit Petitioner to pursue an insanity defense because counsel failed to comply with Rule 5(f), SCRCrimP. Counsel also failed to show good cause as to why the court should allow late filing of the notice or grant additional time to allow Petitioner to prepare his insanity defense. App. 20; See Rule 5(f), SCRCrimP. Counsel likely could not show good cause because he had failed to conduct any sort of investigation and had no excuse for not complying with the notice requirements of Rule 5(f), SCRCrimP.

Because counsel failed to properly investigate and prepare an insanity defense and timely notify the state of Petitioner's intent to rely on the defense of insanity, Petitioner was left with no defense when his case was ultimately called to trial. Consequently, he had no choice but to plead guilty. In the written explanation required by Rule 203(d)(B)(iv) that counsel filed along with

the notice of appeal, counsel admitted Petitioner did not agree to plead guilty until after the trial judge refused to permit Petitioner to present an insanity defense at trial. App. 20.

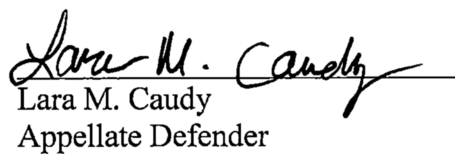
Additionally, Petitioner has established that, with the exercise of due diligence, an insanity defense could have been developed. Petitioner's medical records that were available to counsel contradicted the findings made by the clinical psychologist from the Department of Mental Health. App. 224. His records also prove he suffers from bipolar disorder and PTSD and requires numerous psychotropic medications to manage his illness. App. 224.

Because Petitioner was prejudiced by counsel's deficient performance, this Court respectfully should reverse the order of the PCR court and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of August, 2017.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Andrew L. Blackmon states:

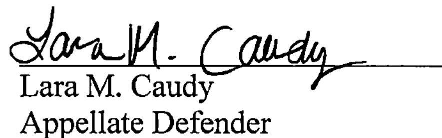
1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.

2. She has reviewed the records and transcript of Petitioner's post-conviction relief hearing, which was held on March 14, 2016 before the Honorable Brooks P. Goldsmith. In her opinion, seeking certiorari from the order of dismissal is without merit.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Andrew L. Blackmon.

Respectfully Submitted,



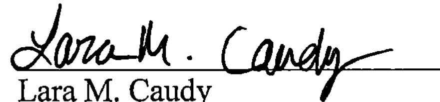
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of August, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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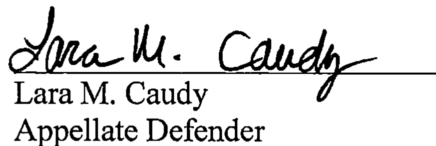
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case have been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served upon Andrew L. Blackmon, #357777, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 23rd day of August, 2017.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 23rd day of August, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.